Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes And Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

OPPOSITION OF THE REAL ACCESS ALLIANCE TO PETITIONS FOR RECONSIDERATION

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SUMMARY

The Orders subject to these Petitions for Reconsideration were wrong to apply Section 224 of the Communications Act to building interiors. That error would be compounded if, as urged by SBPP, competitive carriers could gain access to rights-of-way owned or controlled by utilities without the consent of the building owner. Congress fully preserved the separate rights of owners in 1978 and maintained these rights in the 1996 amendments to the statute. Reliance on the state law of real property is critical to the proper interpretation of Section 224, which (1) permits the ouster of federal jurisdiction in favor of the states, and (2) envisions negotiation under state contract law as the preferred method of access.

Contrary to the petitions of WCA and SBCA, the Orders clearly recognized and properly accommodated the different safety hazards represented by one-way, receive-only video Over-the-Air Reception Devices ("OTARDs") and two-way, transmit-and-receive antennas used in fixed wireless communications. The option granted local governments, owners and homeowner associations to require professional installation of such transceivers is in line with precautions in the regulations for other fixed wireless services such as MMDS and LMDS. The option rests on a presumption of hazard which any challenger to professional installation should be required to overcome in the given case.

The Orders correctly require telephone companies controlling points of demarcation between their networks and interior wiring to move the interface to the minimum point of entry ("MPOE") when requested by the building owner. The petition by BellSouth to declare that an owner's request must be accompanied by unanimous tenant consent is unworkable and should be denied.

Triton's request for an exception to the OTARD rule to permit its Invisible Fiber Units ("IFUs") to function not only as receivers or transmitters on behalf of end-users, but also as relay points for signals to other users throughout the network, should be denied as inconsistent with the "subscriber-end" orientation of the OTARD rule and with the distinction properly drawn between OTARD fixed wireless service and Section 332 personal wireless service.

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OPPOSITION OF THE REAL ACCESS ALLIANCE
TO PETITIONS FOR RECONSIDERATION

The Real Access Alliance[1] hereby opposes the Petitions for Reconsideration filed February 12, 2001 by Smart Buildings Policy Project ("SBPP"), the Wireless Communications

[1] The members of the Real Access Alliance are: the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and The Real Estate Roundtable.

Association ("WCA"), the Satellite Broadcasting and Communications Association/Satellite Industry Association ("SBCA/SIA"), BellSouth and Triton Network Systems ("Triton").[2]

Three of the five Petitioners use words of diminution such as "partial" and "limited" and "clarification," as if hoping to slip past the Commission a few minor changes to Orders they find essentially pleasing. None of the revisions sought is small. Taken together, the five Petitions would add enormously to the legal and policy damage already inflicted by the Orders, and each should be denied.

I. SBPP'S AIM TO FEDERALIZE REAL PROPERTY LAW MUST BE REJECTED.

SBPP argues that Congress never intended, and the Commission should not require, the separate approval of the owner of a building for competitive access to a right-of-way in which a utility claims "ownership or control." (Petition, 4) Moreover, whether a utility owns or controls such a right-of-way cannot be "abdicated" to determination under state law. (Petition, 8) If granted, these claims would go far toward federalizing real property law which the Commission correctly perceives as the province of the states.

A. Congress Fully Preserved the Separate Rights of Owners.

The Real Access Alliance has shown at length in this proceeding, most recently in its Petition at 16-24, why the Orders are wrong to apply Section 224 to building interiors. That mischief would only be compounded if the owner's consent could be omitted as urged by SBPP.

SBPP's claim that "Congress presumed the existence of a third party – the owner of the servient estate – and did not require that third party's separate approval" (Petition, 4) is flatly

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[2] The Real Access Alliance filed its own Petition for Reconsideration ("RAA Petition") on the same date. The decisions challenged consist of a First Report and Order in WT Docket No. 99-217, a Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98 and a Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57 ("Orders").

contradicted by the legislative history of Section 224. At the time of the statute's adoption in 1978, Congress focused on two actors and two only – the pole-owning utility and the cable operator:

> This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems.[3]

The utility owned and controlled the pole. To the extent third parties were involved, they were hardly dismissed or ignored. Instead, their rights were made the direct responsibility of the cable operator:

> [A]ny problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws.[4]

The 1996 amendments to Section 224 did not change this Congressional intention. (RAA Petition, 20-22) Competitive telecommunications carriers stepped into the shoes of the cable operator. The pole access newly guaranteed by Section 224(f) runs against the utility, not some third-party owner. The utility, in 1978 and now, might also own the pole and control the right-of-way, but any third-party owner's rights affected by pole access remain the responsibility of the cable operator or the competitive carrier.

The cable operator's responsibilities were relieved to a degree by the adoption of Section 621(a)(2) of the Communications Act, reading in part:

> Any [cable] franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which [are] within the

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[3] S.Rept. 95-580, 95th Cong., 1st Sess., 15 ("Senate Report").

[4] Senate Report at 16.

> area to be served by the cable system and which have been dedicated for compatible uses . . .[5]

Of course, "public" rights-of-way are not at issue here. And even the private easements "dedicated for compatible uses" have been interpreted, in the better-reasoned cases, as formally recorded and committed to public use.[6] Had Congress meant, as SBPP contends, never to require the separate approval of a third-party private owner, Section 621(a)(2) would have been superfluous. If SBPP finds burdensome the Commission's proper requirement that a telecommunications carrier "obtain independently the permission of the owner of the servient estate (in this case, the MTE owner) to use the right-of-way" (Petition, 4), it must persuade Congress to change the law.

B. The FCC's Reliance on State Law Is Not an Abdication But a Virtue.

This is not the first time the Commission has been invited to subsume the distinctive laws of real property in the several states of our federal system to a uniform regime better suiting the convenience of the supplicants. In 1996, the FCC recognized that "the scope of a utility's ownership or control of an easement or right-of-way is a matter of state law."[7] Two years later, discussing pole rights-of-way occupancy charges specifically, the Commission stated:

> Comments of cable operators, telecommunications carriers and utility pole owners confirm that there are too many different types of rights-of-way, with different kinds of restrictions placed on the various kinds of rights-of-way, to develop a methodology that would assist a utility and potential attacher in their efforts to

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[5] Cable Communications Policy Act, P.L. 98-549, codified at 47 U.S.C. §541(a)(2). Nor, as the Commission acknowledges, is Section 621(a)(2) *carte blanche*, even for cable operators. Its operation is subject to state law, as distinctively applied by numerous courts. Implementation of Local Competition, First Report and Order, 11 FCC Rcd 15499, at ¶1180 ("Local Competition Order").

[6] *Media General Cable of Fairfax v. Sequoyah Condominium Council*, 991 F.2d 1169 (4th Cir. 1993). The court below described carefully and thoroughly how Section 621(a)(2) was the narrowly-drawn survivor of a failed House attempt to grant cable operators compulsory access to private multi-tenant residential and commercial buildings. 737 F.Supp. 903 (E.D.Va. 1990).

[7] Local Competition Order, at ¶1179.

> arrive at a just and reasonable compensation for the attachment. *Such restrictions may also vary by state and local laws of real property, eminent domain, utility, easements* and from underlying property owner to property owner.[8]

In such a legal and policy setting, deference to state law is not abdication but prudence amounting to virtue. Moreover, it comports with two other significant features of Section 224. The first of these, the ability of a state to oust federal jurisdiction under subsection (c), is acknowledged by SBPP, but the Petitioner comes to the wrong conclusion. (Petition, 8-9) Congress clearly was comfortable with the possibility that every state would choose to regulate pole attachments on its own.[9] The fact that only 19 are reported by SBPP to be so engaged at this time does not change the "states rights" orientation of the statute.

If the fear of so-called "reverse preemption" (Petition, 8) were real, it presumably would be accompanied by a parade of horrible impositions of state law on telecommunications competitors in the 19 states which have supplanted federal jurisdiction entirely. There are no such fearful illustrations on this record.

The other significant feature of Section 224 is its primary reliance, at subsection (e), on negotiation to resolve disputes over pole attachment charges. To imagine that contract discussions between parties about payment for access to facilities in specific settings could occur without reference to state and local law – or even that FCC complaint resolution could be abstracted from its state and local context – is simply unrealistic. All the more so when the Commission has declined even to attempt a payment formula for right-of-way occupancy.[10]

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[8] Rules and Policies Governing Pole Attachments, 13 FCC Rcd 6777, at ¶120 (emphasis added) ("Pole Attachment Order").

[9] The legislative history spoke of pole attachments as "essentially local in nature" and described federal oversight as "supplemental" if not transitory. Senate Report, 16-17.

[10] Pole Attachment Order, at ¶121.

In short, SBPP's "abdication" and "reverse preemption" are hollow scare words, devoid of substance, and no reason for the FCC to diverge from its steady course of deference to state laws of real property.

II. PROFESSIONAL INSTALLATION OF FIXED WIRELESS TRANSCEIVERS IS A JUSTIFIED LOCAL SAFETY OPTION.

The Wireless Communications Association ("WCA") and SBCA/SIA (Petition, 10-12) ask the Commission to reconsider its decision to permit "local governments, associations and property owners" to "require professional installation for transmitting antennas." (Orders, ¶119). The Commission explained that it was distinguishing the fixed wireless case of two-way transmission from the video, receive-only communication characteristic of the prior OTARD rules.

The distinction is justified for all the safety reasons outlined in note 296 of the Orders, and must be maintained. For the "usual prohibition" on requirements of professional installation for receive-only small dishes, the Commission cites a case in which safety was never a defense and the installer's sole purpose was to certify, from a technical perspective, that a "non-preferred" location for the antenna was essential to adequate video reception. The Commission found that "requiring an antenna user to hire an installer solely to provide a certificate is an unreasonable expense that violates the [OTARD] Rule."[11]

The fixed wireless case is nothing like that. The Commission supplies all the precautionary reasons why not only fixed wireless but also LMDS and MMDS subscriber-premise installations could be dangerous enough to warrant safety "interlock" features that

[11] *Michael J. MacDonald*, 13 FCC Rcd 4844, 4853 (1997).

would automatically shut down transmissions when blocked by intervening objects or prevent their startup if the transceiver is improperly installed.[12] In fact, by comparison with the safety requirements for LMDS and MMDS transceivers on customer premises, the fixed wireless rules are deficient as they stand.[13] This is no time to diminish their protection further by rescinding the professional installation option.

It is no answer to speculate (SBCA/SIA Petition, 10) that the professional installation allowance is "susceptible to being misapplied . . . in a manner that may unduly constrain the deployment" of satellite dishes. If detrimental misapplication occurs, it can be remedied at the time. Nor is it persuasive to compare the "subscriber self-installation" allegedly now available to cable modem and DSL customers. (WCA Petition, 7) So far as we can determine, that self-installation, if available, refers to wire transmission and not radio. Clearly, different safety considerations apply to the latter. Furthermore, the professional installation requirement is an option for owners and governments, not a mandate.

Without retreating in the slightest from its opposition to the application of the OTARD rules to tenant premises, and to their extension to fixed wireless services, we suggest the Commission keep in mind the role played by the safety exception if honestly administered. The exception saves the preemption from harsh or unwise application and recognizes legitimate concerns of local governments and owners. To diminish further the amplitude of the safety exception will only increase, in our view, the potential for judicial reversal of what is already an infringement on non-federal prerogatives.

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[12] Interlocks to enable shut-off upon blocking of transmission are elective but strongly encouraged; prevention of faulty startup in mandatory for MMDS transceivers. Reconsideration Order, Docket 97-217, 14 FCC Rcd at ¶29. Interlock requirements may be justified by local governments, homeowner associations and owners for safety reasons.

[13] Real Access Alliance, Motion for Stay, filed January 8, 2001, at 6.

III. BELLSOUTH'S UNANIMOUS-CONSENT PROPOSAL FOR MOVING THE DEMARCATION POINT IS UNWORKABLE

BellSouth seeks modification of the Commission's new rule, 47 C.F.R. §68.3, dealing with building owner requests for relocation of the demarcation point. Under BellSouth's proposal a telephone company would not be required to satisfy a building owner's request to relocate the demarcation point to the minimum point of entry ("MPOE") unless each and every subscriber in the building provides a "written acknowledgment and consent to the relocation." (Petition, 4) BellSouth offers nothing new to overcome the earlier rejection of its assertions. (Orders, ¶54, n.125)

In fact, this proposal would frustrate the Commission's purpose in enacting the rule. The Commission's revisions were intended to "*facilitate* the relocation of the demarcation point to the MPOE at the building owners request." *Report and Order,* ¶ 41 (emphasis added). Requiring every subscriber in the building to concur in an owner request to relocate the demarcation point to the MPOE, as BellSouth proposes, would do just the opposite. It would hamper the process unnecessarily.

BellSouth erroneously suggests that new subsection (3) of the demarcation point definition fails to recognize "the needs and concerns" of subscribers in a multiunit building based upon the fact that the rule permits building owners to request relocation of the MPOE without requiring tenant consent. The assumption is that a building owner would neither recognize nor take into consideration the needs and interests of its tenants when deciding whether to make such a request. However, as the Real Access Alliance's comments in this proceeding have demonstrated, ensuring that the needs and concerns of tenants are met is one of the highest priorities of building owners and there is no reason to believe that a building owner would ignore them in this situation.

Building tenants now have the option to subscribe to competing telecommunications providers. It is possible that these tenants and/or their respective providers will have varying, and even conflicting, opinions on the most advantageous location of the demarcation point. Such varied opinions would make obtaining concurrence of every subscriber in the building difficult, if not impossible. For example, one tenant who feels the status quo is preferable could simply withhold its consent, even if the relocation would not materially disadvantage the tenant yet would benefit all of the remaining tenants. Even assuming the interests of all these different tenants were reconciled, the actual logistics of such a requirement would make it unworkable. Requiring the written consent of each subscriber in the building would not only fail to facilitate the building owner's request, but in many cases it could thwart it altogether.

Finally, BellSouth's concern that permitting a building owner to request relocation of the demarcation point "could result in service impairment for actual telecommunications service customers and in significant cost and inconvenience for both subscribers and affected carriers" is unfounded. As noted above, the Orders directly addressed, and denied, these claims at footnote 125 of the Orders. BellSouth's petition should be denied again.

IV. TRITON'S EXCEPTION WOULD SWALLOW THE RULE AND SHOULD BE DENIED.

Triton speculates (Petition, 5) that the reason for the restriction it complains of at ¶99 of the Orders "appears to be the exclusion of multiple collocated antenna devices . . .as OTARDs." Triton does not challenge that basis for the restriction, if correct, but says that its multiple "Invisible Fiber Units" ("IFUs") – the name here referring to a radio substitute for optical fiber – are so low in visual impact as to deserve relief from the restriction.

The Real Access Alliance would be glad to receive any explanation of its reasoning the Commission wishes to offer, but we believe the decision is correct as it stands. The basis for special protection of OTARDs, in our view, is their essentially non-commercial character. They are intended to benefit customers at "customer-end" premises, as the Commission explains it.

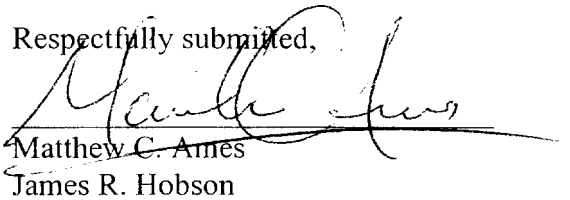
The Orders thus are at pains (¶¶99, n. 256, and 101) to distinguish OTARDs from "personal wireless facilities" as defined in Section 332(c)(7)(C). Base stations in this category have a reception-and-forwarding function that is part of the commercial operation of the network on behalf of all subscribers. In contrast, an OTARD user can only receive and transmit for his own benefit. To our reading, IFUs – however tiny they may be – sound more like commercial components of a ring network than OTARD customer-end transceivers dedicated solely to that single user. Thus, they threaten a far greater expansion of the OTARD rule than Triton imagines or seeks. If the Triton exception is granted, the FCC might be hard-pressed to find a bright line in the gray area we see between the network relay function and the customer-end transceiver function of other antennas that may be analogous to IFUs.

Since the Real Access Alliance believes the OTARD rules already sweep too far, we must oppose the Triton Petition despite its allegedly narrow purpose.

CONCLUSION

For the reasons discussed, the Commission should deny the Petitions for Reconsideration of SBPP, WCA, SBCA/SIA, BellSouth and Triton.

Respectfully submitted,



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I hereby certify that I have caused to be mailed this 14th day of March, 2001, copies of the foregoing Opposition of The Real Access Alliance to Petitions For Reconsideration, by first-class mail, postage prepaid, to the following persons:

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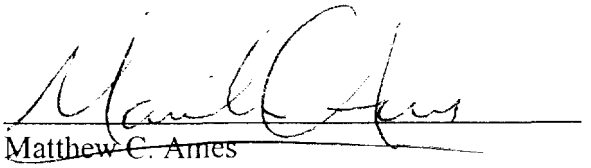

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